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ATTORNEY FOR APPELLANT:

LAURA M. TAYLOR

Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER

Attorney General of Indiana

SCOTT L. BARNHART

Deputy Attorney General

Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

HEATH RUTHEFORD,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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(continued)

No. 49A02-0609-CR-815

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Scott Devries, Judge

Cause No. 49F18-0511-FD-190998

August 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Heath Rutheford appeals his conviction for Theft, as a Class D felony, following a bench trial.¹ He raises a single issue for our review, which we restate as whether the State presented sufficient evidence to sustain his conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

On November 3, 2005, Angela Pope resided as a guest in the apartment of Robert Cory² in Indianapolis. Pope was living with her boyfriend, Rutheford, but they had a “rocky” relationship. Transcript at 5. Whenever Pope and Rutheford were having problems, Cory allowed Pope to stay at his apartment “to keep them . . . from hurting each other.” Id. at 14.

That morning, Cory left for work but allowed Pope to remain at his apartment, as he had done in the past. Cory closed and locked his bedroom door. But when Cory returned to his apartment mid-day for lunch, he found that Pope was no longer there and that his apartment had been burglarized and his bedroom door forced open. Cory called the police and reported that video cameras, a video camera recording unit, a home theater system, a telephone, an eighty-pound steam cleaner, a wall mirror, and a voltmeter had been stolen. Cory gave the police a description of a vehicle and a possible location of Rutheford and Pope.

¹ Rutheford was also convicted of Invasion of Privacy, as a Class A misdemeanor, and Operating a Motor Vehicle With a Suspended License, a Class A misdemeanor. Rutheford does not appeal either of those convictions.

² Although the State refers to Cory as “Coy,” the transcript indicates that the correct spelling is “Cory.”

At approximately 6:44 p.m. that same day, Indianapolis Police Department Officer Mark Spears stopped Rutheford and Pope in a GMC Jimmy matching the description Cory had provided. Rutheford was driving the vehicle and Pope was in the front passenger seat. Officer Spears observed a steam cleaner, a large wall mirror, and some bags of clothes in the back of the vehicle. Officer Spears then called Cory and asked Cory to come to the location of the vehicle. After arriving at that location, Cory identified the cleaner and the mirror as those that had been stolen from his apartment.

On November 4, the State charged Rutheford with theft, as a Class D felony, Invasion of Privacy, as a Class A misdemeanor, and Operating a Motor Vehicle With a Suspended License, a Class A misdemeanor. On April 18, 2006, Rutheford was convicted on each charge following a bench trial. The court subsequently sentenced Rutheford to 42 days executed and 688 days suspended on the theft conviction, 42 days executed and 323 days suspended on the invasion of privacy conviction, and 365 days suspended on the operating a motor vehicle with a suspended license conviction. The trial court placed Rutheford on probation for a total of 545 days on all three convictions. This appeal ensued.

DISCUSSION AND DECISION

Rutheford contends that the State failed to present sufficient evidence to support his theft conviction. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences that may be drawn from that evidence to determine whether

a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. A conviction may rely on circumstantial evidence alone if that evidence supports a reasonable inference of guilt. White v. State, 846 N.E.2d 1026, 1030 (Ind. Ct. App. 2006), trans. denied.

To prove theft, as a Class D felony, the State was required to show beyond a reasonable doubt that Rutheford “knowingly or intentionally exert[ed] unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use.” See Ind. Code § 35-43-4-2(a) (2004). But, again, a judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt. White, 846 N.E.2d at 1030. “[T]he unexplained possession of recently stolen property provides support for an inference of guilt of theft of that property.” Allen v. State, 743 N.E.2d 1222, 1230 (Ind. Ct. App. 2001), trans. denied. See also Buntin v. State, 838 N.E.2d 1187, 1190 (Ind. Ct. App. 2005) (“Generally, the unexplained possession of recently stolen property is sufficient evidence from which the trier of fact may infer the actual theft.”) (citing Brown v. State, 827 N.E.2d 149, 153 (Ind. Ct. App. 2005), trans. denied).

Rutheford maintains that “[t]he only evidence supporting his conviction was the fact that he was driving the vehicle in which the purportedly stolen items were found. [T]his sole fact was entirely insufficient to establish . . . guilt.” Appellant’s Brief at 5. Rutheford’s position seems to be based on Barnett v. State, 834 N.E.2d 169, 172 (Ind. Ct. App. 2005), in which we held that “knowledge of the stolen character of the property

may not be inferred solely from the unexplained possession of recently stolen property.”

But Barnett concerned a charge of receiving stolen property, not theft. There is a material difference in the evidence required to support those two charges. As we stated in J.B. v. State, 748 N.E.2d 914, 917-18 (Ind. Ct. App. 2001):

until otherwise instructed by our Supreme Court, if the State charges a defendant with theft, we will continue to apply the rule that the mere unexplained possession of recently stolen property may be sufficient to support such a conviction, but if the State alleges receiving stolen property, the unexplained possession of recently stolen property must be accompanied by additional circumstances which support an inference that the accused knew that the property was stolen.

Hence, Barnett is inapposite to Rutheford’s theft conviction, and the rule we must apply to his appeal from that conviction is the rule stated in Allen.

Here, Rutheford was found, without explanation, in possession of the property stolen from Cory’s apartment less than twenty-four hours after that theft occurred. Thus, he had a sufficient connection with the scene of the theft for the court to infer his guilt on that charge. See Allen, 743 N.E.2d at 1230. As that circumstantial evidence alone supports a reasonable inference of guilt, we must affirm Rutheford’s conviction for theft. See White, 846 N.E.2d at 1030.

Affirmed.

BARNES, J., concurs.

RILEY, J., dissents with separate opinion.

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HEATH RUTHEFORD,)	
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Appellant-Defendant,)	
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vs.)	No. 49A02-0609-CR-815
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STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

RILEY, Judge, dissenting.

I would reverse Rutheford's conviction for theft. Although knowledge that property is stolen may be established by circumstantial evidence, I do not believe there is sufficient circumstantial evidence in this case. Specifically, it is my view that possession of recently stolen property, by itself, is not enough to prove a defendant knowingly exerted unauthorized control over property of another person. Rather, only when such possession is joined with additional circumstantial evidence, such as (1) attempts at concealment, (2) evasive or false statements, or (3) an unusual manner of acquisition, is the evidence sufficient to support the conclusion that property was knowingly stolen. *See Purifoy v. State*, 821 N.E.2d 409, 414 (Ind. Ct. App. 2005), *trans. denied*. In the instant case, the only evidence supporting the conviction is that the items stolen from Cory's

apartment were found in Rutheford's vehicle. Officer Spears testified that the property was in plain view in the car. There is no evidence that Rutheford was evasive or made false statements. Furthermore, although the evidence clearly supports an inference that the property was acquired during a break-in, there is no evidence that Rutheford acquired the property in an unusual manner. In fact, the only evidence of anyone being inside Cory's apartment points to Pope, rather than Rutheford. Thus, because there is no evidence that Rutheford attempted to conceal the property, made false statements, or acquired the property in an unusual manner, I would reverse the trial court's conviction.